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No. 624 and No. 661 Misc.

Supreme Court of the United States

OCTOBER TERM, 1967.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
CHARLES W. BARTLETT, Trustee, ET AL.,
Respondents.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS WITH PETITION ANNEXED

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

1. The nature of the opposition

The opposition to the petitions comes primarily from the New Haven, including echoes from persons serving in its *apparat* for the plan. The B&P trustee has not noted opposition. (Nor did he oppose petitioner in the Court of Appeals.)

For 29 years the New Haven has maneuvered judicial avoidance by a brilliant campaign of procedural obstructions, so as to keep B&P and its owners in chancery[1] *by denying them the decisions on the merits which would extricate B&P,* always seeking to force a confiscation of the B&P enterprise through sale to New Haven — applying perpetual attrition until the B&P owners in time will accept confiscation (notwithstanding the $1,000 investment value of B&P shares and B&P's entire freedom from capital debt) rather than undergo more uncompensated years on the judicial merry-go-round.[2]

The echoing Kynett Stockholders Committee consists of three persons who were assembled to form a committee to sponsor a sale of the B&P enterprise to the New Haven under the formalities of Section 77, which New Haven has insisted on as the only way to prevent the B&P stockholders from obtaining an appraisal of their ownership. The testimony herein shows that late in 1963 the New

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[1] "In chancery. — 1. *Law.* In litigation in a court of chancery, as an estate. 2. *Boxing.* Of the head of an antagonist in a secure position under one's arm so that one can pommel it. 3. In a helpless position." Webster's Collegiate Dictionary (6th ed.).

In the new 7th edition boxing yields to wrestling, thus: "a wrestling hold that imprisons the head or encircles the neck: STRANGLEHOLD". That sounds right. But petitioner does not adopt its change in No. 3 altering "helpless" to "hopeless". Not while this Court sits.

[2] A term attributed to Judge Learned Hand.

Haven trustees (per Messrs. Dorigan, Moore, and Garfield) called on a New York broker, Joshua A. Rich IV, who had appeared in the New Haven proceeding before Judge Anderson in 1961 representing New Haven income bonds to urge the appointment of a particular trustee. They agreed on a $110 price for New Haven to offer to the B&P stockholders. In order to discourage the stockholders from seeking more, it was decided to present the offer as a plan obtained by a stockholders committee. Mr. Rich called in Ralph M. Arkush, Esq., (whom he had earlier brought in to organize a committee). Mr. Arkush undertook to put it through as a plan won by the Committee.[3] The members of the Committee own no B&P shares (according to a recent list) although at one time they held 50 shares. At the suggestion of Mr. Arkush Judge Anderson in New Haven approved allowing the New Haven to buy the B&P for $110 flat, but only on the condition that 2/3 of the B&P public stockholders should sign authorizations or proxies appointing the Kynett Committee to represent them (through Mr. Arkush) *before* the I.C.C. should begin its hearing to decide whether the plan was fair enough to be submitted to the stockholders. The Committee solicited authorizations as being necessary to comply with Judge Anderson's requirements and to prevent "forfeiture."[4] (The I.C.C. decided

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[3] See Appendix C to the mandamus petition, pp. 21-24. That document is referred to herein as Appendix C.

[4] Judge Anderson explained that he was seeking ways to close the "escape hatches" against the B&P stockholders. See *Second New Haven Reorganization*, U.S.D.C. (D.Conn.) No. 30, 226, Hearing March 2, 1964, Tr. 77, and Order No. 225.

He always excludes the B&P Corporation and its stockholders from participation in his proceedings concerning B&P, whether in the first N.H. reorganization or the second. Mr. Arkush dealt with Judge Anderson informally in chambers.

The first N.H. reorganization (No. 16,562) has been kept open because New Haven has never been reorganized *vis a vis* B&P. It is used to maintain New Haven's hold on B&P, and it is the longest Section 77 reorganization proceeding in history, open since 1935.

that the $110 plan would be forfeiture.) The authorizations expressly refrained from consenting to any plan. They provided standing for the Committee counsel and propaganda value. The Committee has a monopoly license from the I.C.C. to solicit stockholders. (See Appendix C. pp. 6-7.) Upon the death of Mr. Arkush his advocacy passed to his local Boston co-counsel now opposing petitioner in the name of the Committee committed to the New Haven.

To the extent that stockholder support for the plan is informed and not controlled by any conflicting interest in the New Haven or other railroads[5] it has been induced only by persuasion that the prospect of ever getting judicial decisions of B&P's crucial questions on the merits is too dim to wait for any longer.

B&P is probably New Haven's largest creditor, but its claim is unrepresented in Judge Anderson's Second proceeding.

The ineffectual B&P reorganization proceeding in Boston (*sans* properties, business, revenues, or accounting from the N.H. trustees in possession) has been unable to overcome the New Haven court's stranglehold. See *Warren* v. *Palmer*, 310 U.S. 132 (1940); *In re New York, N.H. & H. R. Co.*, 169 F. 2d 337 (2d Cir. 1948); Certiorari denied *sub nom. Mulcahy* v. *New York, N.H. & H. R. Co.*, Nov. 15, 1948, 335 U.S. 867 (No. 316).

[5] The Delaware & Hudson chairman and president has become B&P's largest individual stockholder.

The New Haven trustees have contracted to re-sell the B&P to Penn-Central on profitable terms. New Haven Trustee Smith assured the Pennsylvania and New York Central presidents that

> "the trustees considered that the B. & P. assets would be worth considerably more than what the trustees would be required to invest in order to acquire the assets."

President Saunders of P.R.R. said that

> "they would not recognize the validity of the claims of the [N.H.] trustees on the B. & P. bonds."

See Memorandum of conference of New Haven trustees with P.R.R. and N.Y.C. presidents dated December 2, 1964.

Offered as evidence at the I.C.C. New York hearing on January 16, 1967, received January 17. (See mandamus petition herein, pp. 15-16.) Filed in B&P reorganization I.C.C. compensation hearing Feb. 2, 1967, I.C.C. F.D. 12131, Tr. p. 1245. Marked Exhibit 39.

2. The court is the stockholders' true fiduciary

Petitioner (the Development Group) is the senior B&P stockholder party. It has maintained its continuity, its fiduciary mission for the entire B&P stockholder class, and its independence, intact since 1954. Petitioner is the only stockholder party not bound to the New Haven. The Development Group includes 2 of B&P's 6 directors. It has never sought general proxies. But it has never been limited to two stockholders (although two would be enough).[6] See Appendix C, pp. 5-7.

When confronted with two opposing stockholder groups Judge Friendly's remarks in a recent *Alleghany* case provide the correct judicial guide:

> Once a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend the joint handiwork . . . .
>
> To say that "Through its representatives, it [Alleghany] elected to settle" is sheer fiction. Most of the independent Alleghany stockholders had no voice in the selection of their "representatives" or ability to evaluate the settlement their "representatives" had accepted for them. *I cannot see how the attorneys opposing the settlement were any more representative than the attorney opposing it. The stockholders' true representative was the court* . . . .
>
> *Alleghany Corp.* v. *Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Emphasis added.)

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[6] See the Development Group's appeal to this Court for fair divisions, *Boston & Providence R. Corp. Stockholders* v. *New York, N.H. & H. R. Co.*, October Term 1955, No. 437.

See also the 1958 B&P petition for certiorari. *Boston & Providence R. Corp. and Stockholders* v. *New York, N.H. & H. R. Co.*, October Term, 1957 No. 859.

3. What made petitioner unable to print the record appendix and brief in final form was the court's rejection of the 1,213-page printed Record Appendix already existing.

In its two *per curiam* memoranda the Court of Appeals made several erroneous findings and conclusions against petitioner.[7]

To set the record straight, a true account of petitioner's dealings with the Clerk's office is appended hereto. In light of that account the conclusion that petitioner or its counsel did not prosecute the appeal with diligence is oppressive and absurd.

Ironically the court charged petitioner with trying to avoid printing designated matter, while impossibly forcing petitioner instead to reprint matter that was *not* designated. Ironically the court insisted in both memoranda that *appellant must be denied an extension because appellees must not.*

Close analysis is convincing, however, that what triggered the dismissal was the printer's report to the Clerk that it was *impossible* to meet the deadline with the new reprinting. That instantly propelled the dismissal—witness the first memorandum:

> We also note that the printer has informed us this morning that the record cannot be printed even on the date to which extension is now asked.
>
> (Appendix A, p. 2a)

The second memorandum says that "if someone must suffer" it ought to be the Boston & Providence side rather than the New Haven side.[8] p. 5a) It berates petitioner for supposedly supposing that the court might not grant an extension to appellees—an odd reason for dismissal.

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[7] It would doubtless have reversed a district court for making them.
[8] But why must anyone suffer?

But it ends by returning to the determining factor, saying:

> Furthermore, we note that petitioner makes no reply to the statement in our previous memorandum that petitioner's printer informed us it could not possibly meet even the new date to which extension was sought. (pp. 5a-6a)

Petitioner asked the printer for an explanation and received this answering letter:

> Dear Mr. Rood:
>
> You've called my attention to the Court's memorandum of April 18th in this case, which states that "Petitioner's printer informed the Court it could not meet even the new date to which extension was sought."
>
> You will remember that I originally named April 3rd, as my earliest date if all material were immediately available. I understand that you changed it to March 31 after talking with the clerk's office. I informed you that we would try to meet this date. However, the original plan called for using a volume of the old record appendix that was printed in an earlier appeal.
>
> The situation became more complicated when you asked me to reprint part of the material in this old record appendix. When you added this material there was absolutely no doubt in my mind that the date of March 31st was impossible. I therefore informed you of this fact.
>
> Very truly yours,
> BLANCHARD PRESS, INC.
> JOHN A. SUTHERLAND
> *Treasurer.*

4. The court's rejection of the existing Record Appendix requires supervision as

(a) an oppressive departure from acceptable practice;
(b) a matter of national importance;
(c) a conflict with the other circuits.

A volume of the existing Record Appendix is tendered herewith. It is the same record, in the same court, the same case, having the same questions, with the same parties.[9]

It is a $10,000 document, which raises the matter of litigation expense. Unlike the others, the First Circuit has done nothing to alleviate the ever-increasing costs of letterpress printing. 1967 might as well be 1867.

Rules of procedure, as Mr. Justice Black insists, should not be enforced to deprive parties of decision on the merits. But here Cardozo's *demon of formalism* has taken possession more extremely than in any of Justice Black's recent examples.

It comes to this. Unless this Court will now intervene, the Boston & Providence and hundreds of owners, following 29 years of appalling mistreatment by judicial avoidance[10] maneuvered against them procedurally by their avaricious fiduciary in New Haven, must now suffer confiscation by surrender of $5,000,000 for the debentures (not

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[9] The United States claims a legal interest herein as an additional party by being a fully secured creditor of New Haven on a loan now in good standing. Petitioner says the United States has no creditor interest in B&P. As *parens patriae* the Government should support petitioner.

[10] The district court will not hear petitioner's motion to adjudicate the debentures, its motion to require B&P to file annual reports to the I.C.C. as Class I line-haul carrier (instead of on the lessor form), or its petition for a hearing on the best way to sell the highway route.

to mention at least $10,000,000 in property values) simply because—

(a) the Commission approved the surrender as fair *if* the district court should hold B&P liable on the debentures;

(b) the district court approved the Commission plan but refused to pass on the debentures (which Penn-Central does not recognize as valid);[11]

(c) the court of appeals refused to review the matter, holding that hundreds of Boston & Providence stockholders "must suffer" the confiscation without adjudication because their lawyer and printer could not meet a printing requirement which was superfluous, wasteful, and burdensome, on a schedule shown to be impossible.

The issue transcends B&P and railroad reorganizations. The matter of printing costs is a serious issue of national judicial administration, increasingly shutting the door.

The sides are most uneven. The stockholders have obtained no reimbursement. The I.C.C. sits on their petitions for allowances. New Haven, on the other hand, is the most active railroad corporation litigant.

The stockholders do not get proper protection through the ineffectual B&P reorganization in Boston. But B&P should not be a court debtor. Its railroad is still prime, and now subsidized. Its disposable real estate in Boston and Providence offers coveted sites for enormously valuable non-railroad developments. B&P's investment value exceeds $1,000 per share. Petitioner can prove (if the federal judiciary will ever allow decision on the merits) that B&P has no capital debt. B&P's cash assets exceed $2,000,000. The Commonwealth is doing its best to over-

[11] *Supra*, note 5 on page 3.

come New Haven barriers by getting a surplus B&P route into Boston for Interstate Highway 95 so as to pay B&P perhaps $8,000,000, or $200 per share. Then all pretext for keeping B&P in chancery should vanish. New Haven (now joined by Penn-Central) seeks to force the title into New Haven first (for Penn-Central's benefit). In refusing to consider petitioner's administrative objections to the plan in 1966, Judge Ford said they would be settled by agreement, as then seemed possible. But New Haven will not confer. On October 2, 1967, the P.R.R. assistant general counsel would not support petitioner's amendments (although the Commonwealth supported them before Judge Ford on October 11) that would solve the B&P problem and the Commonwealth's problem. He said that the question was whether the highway funds would mostly go to New Haven (for Penn-Central) for new railroad construction under the plan's fine type, or go (under the amendments) to the B&P stockholders.

5. This Court has special responsibility for supervision because it approved the impossible divided jurisdiction making the Boston court administration ineffectual.

When the New Haven court had B&P's lease rejected in 1938 (as of 1936) it retained B&P's properties to secure a prior lien claim that it allowed against B&P on the theory that New Haven had operated it for B&P account retroactively since 1936, and that the New Haven's division of operating revenues for B&P as a separate carrier estate east of Providence produced a deficit of $100 per B&P share through 1937. With those auspicious beginnings B&P went into a Section 77 administration in Boston, but the Boston court was unable to get the B&P properties, business, earnings, or control over the measure of earnings.

New Haven has kept hold, and there has been no accounting, although (even with recent New Haven deficits) the joint net railway operating income awaiting division with B&P under the standards of Section 15(6) of the Interstate Commerce Act (Appendix C, p. A-1) exceeds $100,000,000 through 1966, as shown in *Moody's*.

This Court repeatedly rebuffed the efforts to straighten out the judicial impossibility of the split jurisdiction between two circuits. See the four Supreme Court decisions cited in footnotes 4 and 6 *supra*. The rebuff has rendered the Boston proceedings ineffectual. When, after being rebuffed by this Court in *Warren* v. *Palmer*, 310 U.S. 132, the original B&P president and trustee (Mr. Warren) proposed a strong procedural program, Judge Ford in Boston turned it down in chambers, saying: "I don't want to get into a rat race with Judge Hincks." And when petitioner's counsel informed former Chief Judge Magruder of the First Circuit that the 1957 plan appeal was coming on, the latter replied, "Oh God, we don't want to hear that. I told Ford to get that damned thing off the docket."

The present Chief Judge inherits Judge Magruder's office. Given his early years in the eminent Boston firm of Choate Hall & Stewart, the New Haven's traditional reorganization lawyers (whose senior partner Mr. Garfield still seeks to complete his 1939 grand New Haven plan herein) the present Chief Judge can appreciate that the situation has become a judicial quagmire. As district judge in 1955 he refused to instruct the B&P to join as co-appellant to the Supreme Court in the B&P 1955 appeal (*supra*, note 6).

6. The development of November 6, 1967

On November 6 the I.C.C. issued an order refusing to wait for the Supreme Court to pass on these petitions, and re-

fusing to let petitioner's September amendments be considered,[12] before the plan for immediate sale to New Haven shall be submitted to the vote of the stockholders. Clearly the plan does not deserve its judicial certifications to the stockholders. Petitioner is informed that an I.C.C. employee has now telephoned instructions to the B&P trustee to conduct the vote immediately for stockholders of November 9, 1967.

Conclusion

It is no wonder that the proposed title of a projected book on the judicial degradation of B&P is "How to Railroad a Railroad".

Respectfully submitted,

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November 7, 1967

[12] New Haven's brief herein condemns such consideration as "premature". Since 1954 New Haven pleadings have nearly always seen petitioner's rescue work for B&P as premature or too late, or brought in the wrong forum.